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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

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I. RESPONDENTS' INTERPRETATION OF THIS COURT'S DECISION IN RUCKELSHAUS v. SIERRA CLUB IN FACT TURNS RUCKELSHAUS ON ITS HEAD AND PRODUCES UNMANAGEABLE RESULTS.

Respondents in their briefs in opposition to certiorari raise a number of contentions intending only to obfuscate the real issue in this case. The real question is whether Congress, through the enactment of § 11(g) of the Endangered Species Act (and similar citizen's suit provisions of other federal environmental laws) intended to impose a substantial, exceptional contribution standard upon prevailing parties prior to the award of reasonable attorney's fees.

Congress clearly did not intend such a result. The legislative history only supports the interpretation that a prevailing party status is a sufficient

condition for an award of attorney's fees in all but unusual or exceptional cases. This result is more compelling when viewed in the proper historical context; i.e., a period when Congress intended to divise a statute for awarding fees to environmental litigants broader than any other fee statute enacted to that time. This Court in Ruckelshaus v. Sierra Club, ___ U.S. ___, 103 S.Ct. 3274, 3279 (1983), has already recognized that Congress meant to liberalize fee awards in environmental litigation as compared with, for example, federal civil rights litigation. And if that is the intended result why would Congress impose such a restrictive standard upon environmental litigants seeking fee awards when it had not done so in other contexts?

The Ninth Circuit and Respondents also fail to recognize that the substantial, exceptional contribution standard used to deny Petitioner attorney's fees evolved in the federal judicial system prior to the Ruckelshaus decision, in a period when courts had considered the fees provisions in environmental laws to allow awards to losing parties. See, e.g., Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982); and Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981).

In that context it makes eminent sense that a stringent standard be imposed upon losing parties before allowing an award of fees, to avoid frivolous litigation and parasitic intervention. And while that standard has received a substantial measure of

criticism,[1/] it did serve as a basis for courts to deny fee awards to losing parties in a majority of cases and grant them in a selected few. Compare Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982), with Sierra Club v. Gorsuch, supra.

In contrast, there has been no uncertainty or confusion demonstrated by courts over awards to prevailing or partially prevailing parties. See

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1/See Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982)(J. Wilkey, dissent). When the Court of Appeals for the District of Columbia stated that it had articulated "one standard of appropriateness, and that standard allows courts to award attorneys' fees to parties who have 'substantially contributed' to the goals of the . . . Act" it was attempting to resolve the confusion regarding the circumstances under which losing parties would receive fee awards rather than imposing the standard on both losing and prevailing parties. See Sierra Club v. Gorsuch, 672 F.2d at 42, n.10.

Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981) (affirming an award of attorney's fees under the ESA without imposition of a substantial, exceptional contribution standard).

Moreover, this Court in Ruckelshaus clearly intended to avoid needless, wasteful inquiries into the nature of a prevailing party's contribution in all cases but where the success was trivial or purely procedural in nature. Ruckelshaus, 103 S.Ct. at 3279, n.9.

The result Petitioner's urge is practical and workable. Given this Court's distaste for seemingly endless litigation over attorney's fee awards, a sentiment shared by Congress, the interpretation of Ruckelshaus which the Ninth Circuit and Respondents advocated must be rejected. Yet Respondents make no

effort to conceal the confusion and waste their result would perpetuate:

> Ruckelshaus did not disrupt existing care [sic] law requiring a party to make a contribution. Thus, after Ruckelshaus, in order for a fee award to be deemed "appropriate," a party must not only prevail but he must also make a contribution.

Brief In Opposition for State of Nevada, p.5. It was, in fact, this "case-by-case scrutiny by federal courts" which this Court sought to avoid once and for all by its decision in Ruckelshaus 103 S.Ct. at 3279.[2/]

[2/] Contrary to Respondent's claim, Petitioner does not confuse eligibility with entitlement. See Brief in Opposition of Carson-Truckee Water Conservancy District and Sierra Pacific Power Company, p.6. Ruckelshaus makes no reference whatsoever to a distinction between eligibility for and entitlement to an award of attorney's fees. After Ruckelshaus there is little doubt that prevailing parties are (cont.)

From the outset of this litigation Petitioner has taken an active, extensive role in the protection of two species of fish threatened with imminent extinction. The fact that Petitioner's active, extensive involvement in the litigation -- through which it ultimately prevailed -- achieved the objectives of the ESA should result in an award of fees to Petitioner under the Ruckelshaus decision.[3/]

[2/](cont.)entitled to an award absent exceptional circumstances. The result Respondents urge -- namely, that winning parties are merely eligible for an award -- would subvert the intent of the statute and be repugnant to the decision in Ruckelshaus.

[3/]Respondents claim that Petitioner is merely in the litigation for its own pecuniary benefit. Nothing could be further from the truth. The fact that Petitioner may ultimately establish a commercial fishery as a valid exercise of its treaty (cont.)

Because of the Petitioner Tribe's status as an intervenor, questions of possible overlap of efforts, if any, relating to the litigation of ESA issues might exist. See, e.g., Alabama Power Company v. Gorsuch, 672 F.2d 1, at 2, 3 (9th Cir. 1983). However, this status should only be considered by the district court on remand in determining the amount of fees awarded, rather than a basis to deny fees outright.

II. RESPONDENTS' CONTENTION THAT ONLY PARTIES COMMENCING ACTIONS UNDER SECTION 11(g)(1) OF THE ESA MAY RECEIVE FEE AWARDS UNDER SECTION 11(g)(4) IS UNSUPPORTABLE.

By its use of the word "commence" Congress clearly did not intend § 11(g)

3/(cont.) rights if two species are removed from the endangered and threatened status does not diminish the valuable efforts Petitioner has made in achieving the objectives of the ESA.

of the ESA, 16 U.S.C. § 1540(g), to be interpreted and applied so narrowly as to allow fee awards only to parties literally filing suit under the Act. A far more reasonable and supportable interpretation is that parties "commencing" or initiating the enforcement of the ESA should receive fee awards if they prevail in their efforts.

First, the statute clearly endorses actions "to enjoin any person" from violations of the Act. 16 U.S.C. § 1540(g)(1). The context of this case, albeit somewhat different from traditional ESA enforcement suits, left Petitioner Tribe with no alternative but to intervene as a defendant. The alternative of awaiting the outcome of the suit with the possibility of having to sue to enjoin the sale of water if

Respondents prevailed would have been unduly risky.

Significantly, Respondents have never in the course of this litigation challenged Petitioner's standing to raise or litigate ESA issues. Moreover, despite the fact that the Secretary first raised the ESA as a defense, it only made sense for Petitioner to intervene and likewise raise the same defense. And, as alluded to in its petition for writ of certiorari, Petitioner's suspicion that its interests would not be adequately represented was ultimately confirmed by actions of the Secretary subsequent to commencement of the action.

Second, the attorney's fee provision of the ESA provides for an award of fees and costs to "any party." 16 U.S.C. § 1540(g)(4). In the context of an

identical fees provision of the Toxic Substances Control Act, 15 U.S.C. § 2618(d) Congress interpreted the phrase "any party" to "mean the parties seeking to enforce the rights granted by this section and can include an intervenor, or a defendant in some cases. . . ." (Emphasis added.) S. 3149, 94th Cong., 2d Sess., § 19(c)(3) (1976); H.R. 14032, 94th Cong., 2d Sess. § 19(c)(3) (1976), quoted in Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 49 (D.C. Cir. 1982).

Significantly, while ruling on other grounds, the district court below expressed in its decision the view that Respondent's narrow construction of § 1540(g)(1) and (4) had no merit. See Pet. App. 7. The more liberal interpretation advocated by Petitioner would truly effectuate the purposes of

the ESA and congressional intent. See Village of Kaktovik v. Watt, 689 F.2d at 225.

III. CONCLUSION

With changing administrations and policies, the enforcement and implementation of federal law is all too often left to the political whim of officials not concerned with the long term objectives of those laws. Through the enactment of federal environmental legislation Congress has attempted to chart a long-term course for protecting the environment; those goals should not be allowed to be subverted by agency whim. Hence, the role of the "private watchdog" has been accorded an important status by Congress in the federal enforcement scheme. Petitioner effectively played the role of the private watchdog in this case and

ultimately prevailed in enforcing the objectives of the ESA. For these efforts, the ESA supports a reasonable award of attorney's fees upon remand to the district court.

Respectfully submitted,

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